

1
2
3
4
5
6
7
8
9

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

12 || ANTONIO ARANT

Plaintiff,

V.

15 || DR. BUNNER, *et al.*,

Defendants.

Case No. C04-5663JKA

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT, AND DISMISSING
THE ACTION**

This 42 U.S.C. § 1983 civil rights action is before the court on consent pursuant to 28 U.S.C. § 636 (c)(1). (Dkt. # 23). Defendants have filed a motion for summary judgment. (Dkt. # 50). Plaintiff has responded. (Dkt. # 51). Defendants have replied. (Dkt. # 52). This matter is now ripe for review.

Having reviewed the motion, the attachments and exhibits and the remaining record in the file
the court concludes that plaintiff's Eighth Amendment right to be free from cruel and unusual
punishment is not denied by a failure to provide him with a surgical procedure to correct damage to
his nose caused by a fight with another inmate during a prior incarceration.

FACTS

On October 27th, 2001 plaintiff was in a fight with another inmate at the Washington Corrections Center. (Dkt. # 50, Exhibit 1). Plaintiff broke his nose. Plaintiff was evaluated and it

28 | ORDER - 1

1 was determined that surgery was not necessary at that time. (Dkt. # 50, Exhibit 3). Plaintiff did not
2 complain of trouble breathing. Plaintiff was instructed to sign up for sick call if he had trouble
3 breathing. Between October of 2001 and May of 2002, when plaintiff was released from custody, he
4 was seen once for a headache and trouble breathing. That medical treatment occurred on December
5 26th, 2002 at the Airway Heights Correction Center. (Dkt. # 50, Exhibit5).

6 Plaintiff was able to work as an iron worker and as a carpenter while in the community.
7 (Dkt. # 50, Exhibit 5 Attachment A page 34 to 49). On February 14th, 2003 plaintiff returned to the
8 Department of Correction on a new felony conviction. At that time plaintiff indicated he did not
9 have any medical problems or physical limitations. (Dkt. # 50, Exhibit 5, Attachment A page 41).

10 Plaintiff waited for over two years after re-incarceration before seeking medical treatment for
11 his nose. In June of 2005 plaintiff was evaluated after he complained of "nasal headaches". The
12 person who evaluated him, Margie Sanford, is not a named defendant. Ms. Sanford determined
13 plaintiff was able to breath through both nostrils but had decreased airflow through the right nostril.
14 (Dkt. # 50, Exhibit 7).

15 On June 29th, 2005 Ms. Sanford presented plaintiff's request for surgery to a care review
16 committee. The committee consisted of three doctors, two physicians assistants, and three nurses.
17 (Dkt. # 50, Exhibit 2 Attachment F). The committee determined that clinical evaluation did not
18 support a finding of medical necessity for the surgery and the request was denied. (Dkt. # 50,
19 Exhibit 2). The parties disagree as to how often plaintiff gets nasal headaches. (Dkt. # 50 and 51).
20 The record discloses plaintiff has only sought medical treatment four or five times since 2001
21 complaining of any pain or trouble breathing. (Dkt. # 50, Exhibit 5 attachment A pages 14 to 49).
22 Further, plaintiff admits his headaches are responsive to treatment with Tylenol and he has not had
23 any problem getting Tylenol while in custody. (Dkt. # 50, Exhibit 5, at 29 and 36).

24 DISCUSSION

25 Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that there
26 is no genuine issue as to any material fact and that the moving party is entitled to judgment as a
27 matter of law. Fed. R. Civ. P. 56(c). In deciding whether to grant summary judgment, the court
28 ORDER - 2

1 must view the record in the light most favorable to the nonmoving party and must indulge all
 2 inferences favorable to that party. Fed. R. Civ. P. 56(c) and (e). "When `the record taken as a whole
 3 could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for
 4 trial.'" Matsushita Elec. Industr. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), quoting First
 5 Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 289 (1968).

6 A plaintiff must allege deprivation of a federally protected right in order to set forth a *prima*
 7 *facie* case under 42 U.S.C. § 1983. Baker v. McCollan, 443 U.S. 137, 140 (1979). A 42 U.S.C. §
 8 1983 complaint must allege that (1) the conduct deprived a person of a right, privilege, or immunity
 9 secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535
 10 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the
 11 appropriate avenue to remedy an alleged wrong only if both of these elements are present. Haygood
 12 v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

13 Here, plaintiff alleges that his constitutional right to be free from cruel and unusual
 14 punishment has been violated by the medical care he has received. An inmate's Eighth Amendment
 15 rights are violated if he or she is treated with deliberate indifference to his or her serious medical
 16 needs. See Estelle v. Gamble, 429 U.S. 97, 106 (1976); Jones v. Johnson, 791 F.2d 769, 771 (9th
 17 Cir. 1986). The indifference to medical needs must be substantial; a constitutional violation is not
 18 established by negligence or "an inadvertent failure to provide adequate medical care." Estelle, 429
 19 U.S. at 105-106; see Anthony v. Dowdle, 853 F.2d 741, 743 (9th Cir. 1988). Similarly, a difference
 20 in opinion as to diagnosis or treatment does not establish a constitutional violation. Shields v.
 21 Kunkle, 442 F.2d 409, 410 (9th Cir. 1971); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.
 22 1981).

23 Plaintiff admits his headaches have been treated with Tylenol and the treatment has alleviated
 24 his pain. Further, the facts of this case show a difference of opinion between plaintiff and the Eight
 25 members of the review committee as to what treatment should be provided, not deliberate
 26 indifference to serious medical need. It is deliberate indifference, not a difference of opinion, that
 27 characterizes an Eighth Amendment violation.

1 To establish deliberate indifference, a prisoner must show that a defendant purposefully
2 ignored or failed to respond to the prisoner's pain or possible medical need. McGuckin, 974 F.2d at
3 1060; Estelle, 429 U.S. at 104. A determination of deliberate indifference involves an examination
4 of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's
5 response to that need. McGuckin, 974 F.2d at 1059. A serious medical need exists if the failure to
6 treat a prisoner's condition could result in further significant injury or the unnecessary and wanton
7 infliction of pain. Id. Plaintiff has not made that showing. Accordingly the defendants' motion for
8 summary judgment is **GRANTED**. This action is **DISMISSED WITH PREJUDICE**

9 The Clerk of Court is directed to send a copy of this Order to plaintiff and to counsel for
10 defendant(s).

11

12

DATED this 15th day of November, 2005.

13

14

15

/S/ J. Kelley Arnold

J. Kelley Arnold

United States Magistrate Judge

16

17

18

19

20

21

22

23

24

25

26

27

28

ORDER - 4